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In The

Supreme Court of the United States

OCTOBER TERM 1971

NO. 1046 71-1046

JOHN IKE GRIFFITH,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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BRIEF AND ARGUMENT FOR RESPONDENT

I

OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals of Alabama is reported as follows:

John Ike Griffith v. State of Alabama, 255 So. 2d 48, October 5, 1971, rehearing denied November 2, 1971 (A. pp. 1-8).

Certiorari was denied by the Supreme Court of Alabama on November 24, 1971. 255 So. 2d 52 (A. p. 9).

II

JURISDICTION

The petitioner has applied to this Honorable Court for a writ of certiorari to review the judgment of the Court of

Criminal Appeals of Alabama rendered on October 5, 1971, rehearing denied on November 2, 1971. A petition to the Supreme Court of Alabama for a writ of certiorari was denied on November 24, 1971.

Petitioner applies for this writ of certiorari under the provisions of Title 28, Section 1257(3), United States Code.

III

QUESTION PRESENTED

Whether the denial of motion for mistrial will support the Supreme Court's jurisdiction when such denial is based upon State law and rules of practice.

IV

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

V

STATEMENT

The petitioner was tried and convicted in the Circuit Court of Jefferson County, Alabama, of unlawfully holding himself out as a qualified attorney and he appealed.

During the trial, when the Court reconvened on March 17, 1970, defense counsel moved for a mistrial based upon an article appearing in the Birmingham Post Herald. While it was alleged that said article recounted the previous day's proceedings and discussed a matter gone into and a ruling thereon outside the presence of the jury, neither the newspaper article or other evidence was presented in support of the motion for mistrial. Said motion was denied.

VI

SUMMARY OF ARGUMENT

Where motion for mistrial was denied because of no showing of the alleged damaging newspaper article nor any evidence presented in support of said motion, the denial of such motion pursuant to State law and the practice in State Courts will not support the Supreme Court's jurisdiction.

VII

ARGUMENT

Petitioner, a white disbarred attorney, sentenced to a fine of five hundred dollars and six months imprisonment for practicing law while disbarred seeks reversal of his conviction on the ground that he was denied due process, as guaranteed under the Fourteenth Amendment, when the trial judge denied a motion for mistrial based upon an allegation that a newspaper article created a prejudicial influence upon the jury.

There was no evidence that the alleged damaging newspaper article was produced or that there was any evidence presented in support of such motion.

Respondent contends that motion for mistrial was properly denied.

It has long been the practice in Alabama that the granting of a mistrial rests in the sound discretion of the trial judge. This rule was stated in *Hallman v State*, 36 Ala. App. 592, 61 So. 2d 857, Cert. Den. 258 Ala. 278, 61 So. 2d 861:

> "Title 30, Sec. 100, Code 1940, empowers the trial judge to declare a mistrial 'when in the opinion of the court or judge there is a manifest necessity for the discharge, or when the ends of justice would otherwise be defeated.'

> "Of necessity the right thus given must address itself to the sound discretion of the presiding judge."

In the case now before this Honorable Court there was no claim that any juror read the newspaper article. Had there been evidence presented such as introducing the newspaper article into evidence and also some evidence that it had been read by a juror, Alabama law would require the State to disprove any damage in view of the fact that the jury was not kept together at night.

The Federal Rule which petitioner seeks to have put into force appears more lax in its application. In *United States v. Rubino*, 431 F. 2d 284 (1970), Cert. Den. 91 S. Ct. 872, 401 U. S. 910, 27 L. Ed. 2d 808, rehearing denied 91 S. Ct. 1224, 401 U. S. 1004, 28 L. Ed. 2d 540, the United States Court of Appeals; Sixth Circuit, held that the trial judge has a large discretion in ruling on the issue of prejudice resulting from reading by jurors of news articles relating to the trial, saying:

> "In the present case, where it is not shown that the newspaper stories came through or from the prosecution, it is our opinion that the burden of establishing that he has been treated unfairly rests upon Rubino. Marshall v. United States, 355 F. 2d 999, 1007 (9th Cir.), Cert. Den. 385 U.S. 815, 87 S. Ct. 34, 17 L. Ed. 2d 54, rehearing denied 385 U.S. 964, 87 S. Ct. 388, 17 L. Ed. 2d 309. Rubino, in our opinion, has made no such showing in the record of the present case."

The granting or denial of a motion for mistrial rests in the sound discretion of the trial judge and this Honorable Court has held that the writ of certiorari may not be used to correct such exercise of discretion in the lower court in

the absence of an aggravated abuse of such discretion. Certainly none has been shown here. The petitioner has not asserted any ground for consideration of this writ under Rule 19. Petitioner was given a fair and legal trial and afforded due process of law. Respondent submits that no federal question is here presented and that this writ should be denied.

VIII

CONCLUSION

For the foregoing reasons, we submit that the denial of motion for mistrial made pursuant to State statute and practice is not such a ruling as will support the jurisdiction of this Honorable Court. There has been no violation of the Due Process Clause because of the ruling of the trial court in exercising its discretion. Therefore, the writ of certiorari should be denied.

Respectfully submitted,

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IX

CERTIFICATE OF SERVICE

I, David W. Clark, one of the Attorneys for Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that I did serve the requisite copies of the foregoing Brief and Argument of Respondent on Attorney for Petitioner, by mailing said copies to him, postage prepaid, as follows:

TO: Honorable Fred Blanton, Jr.
Twenty-One Twenty-One Building
Suite 1627
Birmingham, Alabama 35203

MARCH 6, 1972.

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